F 912
.N7 M88
Copy 2

"THE SPOILERS"

By WILLIAM W. MORROW

REPRINTED FROM THE CALIFORNIA LAW REVIEW
OF JANUARY, 1916

F912
.N7M88
copy 2

16-9894

California Law Review

Volume IV. JANUARY, 1916 Number 2

"The Spoilers"*

There is never a law of God or man runs north of Fifty-three.
—Kipling.

IN DECEMBER, 1905, Harper & Brothers of New York published a book of fiction entitled "The Spoilers." The author was Rex Beach. The scene of the story was in Alaska, mainly at Nome; and it covers a period of about three months from July 15, 1900, to October 15, 1900.

The thread of the story carries a thrilling romance of personal adventure on the part of the principal characters in connection with certain legal proceedings in the District Court at Nome and in the United States Circuit Court of Appeals in San Francisco. The romance is, of course, untrue; and the legal proceedings referred to in the story were made to conform to the general course of the romance.

Mr. Beach was in Nome during the period covered by his story and was familiar with the actual occurrences which formed its groundwork. This appears from his articles entitled "The Looting of Alaska," in Appleton's Booklovers' Magazine for January, February, March, April and May, 1906. The characters in the story are not real characters and were not so intended. Some of them may be identified, but only in a general way, while others have no originals to which reference can be made. They are painted in high colors, as are the scenes in which they move as actors.

Beach's literary art is something of the style of Kipling's as we find it in some of his stories. Its purpose is not to furnish elaborate situations with accuracy of details, but to produce striking figures and pictures which are designed to give stirring impressions of prevailing conditions. It corresponds to the school of the modern

*Address delivered before the Law Association of the School of Jurisprudence, at the University of California, November 19, 1915.

impressionist in the art of painting; and the art in both is criticised because it does not convey accurate information concerning details. On the other hand, there are those who profess to see in the high colors and the startling and vivid impressions an advanced stage of the art. This may be so. If it is, the public is not far wrong in its estimate of this book. For a year or more after its publication, it was one of five books most called for at the libraries; and during the same time it was one of five of the best-sellers on the book-seller's counter. And I am informed that Harper & Brothers have published a number of editions of the book aggregating over 400,000 copies, and that A. L. Burt & Company published a cheaper edition of about the same number of copies. The story has been produced as a drama and has met with favor; and as a moving picture show it is said to be one of the most popular on the reels.

The story is doubtless attractive to the public because it deals with thrilling adventures accompanied by physical force in the midst of elemental conditions, wherein superior force and skill win, but only by a thrilling, narrow margin. As stated by one critic, "It is a frank glorification of brawn and bone; it is dedicated to the physical appetites and passions; it sings the praises of the savage life."

The theme of the story is: "There is never a law of God or man runs north of Fifty-three." These two lines from the "Rhyme of the Three Sealers," by Kipling, written in 1896, was his anathema hurled at the lawless and ruthless slaughter of that magnificent seal herd in the Bering Sea, which in 1867, when the United States acquired Alaska and its islands, numbered between five and seven millions, but which in 1896 had been reduced to about three hundred thousand. This lawlessness—termed, in the elegant and euphonious language of diplomacy, pelagic sealing—was, however, the result of the miserable failure on the part of international law to protect the seal herd in the open sea; while Beach's anathema was directed against the disgraceful failure of a court of justice to administer the principles and procedure of established municipal law in the protection of private property. We know that international law has not the commanding force we once supposed it had; but we do not know why municipal law should not be enforced, especially when it has been clearly and authoritatively stated as it was in this case.

To fully understand the character of the court proceedings at Nome referred to in "The Spoilers," it is necessary to state *in*

limine that one Alexander McKenzie, having acquired the so-called "jumpers'" titles to certain placer gold mines of almost fabulous wealth on Anvil Creek, near Nome, sought by the forms of legal procedure, to eject the owners and obtain possession of the mines and the gold therein contained because of the supposed alienage of the original locators. Another objection to these locations was that some of the original locators had located more than one claim for a single individual on the same creek. As the alleged alienage of these locators is a prominent feature of the controversy we are about to deal with, it will be well to understand who these aliens were, how they came to be in that locality, and whether they were in fact excluded from locating mining claims.

The late Dr. Sheldon Jackson, the energetic and faithful general agent of education in Alaska for twenty-five years under the federal government, undertook in 1891 to introduce domestic reindeer into Alaska for the preservation of the Eskimos, whose food supply was rapidly disappearing by reason of the active and aggressive whaling and fishing industries of the outsiders prosecuted in the Bering Sea and on the shores of Alaska. These reindeer Dr. Jackson had brought over from Siberia.

The project was fairly successful and several reindeer stations were established on the western shore of Alaska; but the Eskimos were not trained in the care and use of the reindeer and the enterprise lacked efficiency on that account. Dr. Jackson accordingly sent to Lapland in 1894 for skilled reindeer herders to come to Alaska and teach the Eskimos how to manage and care for the reindeer herds. He secured seven Laplanders, who brought their wives and children with them, and they took up their abode at the reindeer stations. The principal station was that of Teller, at Port Clarence, about fifty or sixty miles north of Nome.

In the fall of 1897 reports came from the Arctic that the whaling fleet had met with disaster; that two vessels had been crushed in the ice and eight vessels had been caught and were ice-bound in the Arctic Ocean near Point Barrow; and that two hundred and seventy-five men, composing the officers and crew of the fleet, were in dire distress and would perish from hunger unless relief could reach them early in the spring. It was impossible to reach them by sea in that time.

Lieutenants Jarvis and Bertholf and Doctor Call, of the Revenue-Cutter Service, volunteered to conduct an expedition overland for the relief of the imperiled whalers. The offer was accepted by

the general government, and the members of the expedition were landed at Cape Vancouver in Bering Sea, south of the mouth of the Yukon River, on December 16, 1897. From this point they set out on their lonesome and dreary journey over snow and ice through an Arctic night for Point Barrow, distant more than two thousand miles to the north.

They commenced the transportation overland at Cape Vancouver with dog teams; but as they proceeded up the coast, they added reindeer and Laplander drivers to their equipment from their various stations along the coast until they had four hundred and forty-eight reindeer with the necessary number of herders and drivers. They then pushed on through the storms and bitter cold of an Arctic winter until they reached Point Barrow on March 29, 1898, just in time to save the lives of the ice-imperiled sailors whose food supply was about exhausted and who were on the verge of sickness, starvation and death. Fresh meat from the reindeer herd was supplied at once and continued during the time they remained at that point, and they were otherwise cared for until the arrival of the revenue cutter Bear on July 28, 1898—a period of four months. A large number of the reindeer herd had by that time been killed for food.

The purpose of the expedition having been fulfilled, the reindeer herders and drivers were returned to their stations along the coast of Alaska during the month of August, 1898; and many of the whalers were, by their own request, left in that region, only ninety-one of the original two hundred and seventy-five returning to the Pacific Coast. Many of these whalers were Scandinavians, and, with some of the Laplanders, they drifted into the mining region and, after the discovery of gold on Anvil Creek in September, 1898, they proceeded to locate mining claims in that locality.

There was also another expedition that contributed adventurers to the new mining section. About the same time the news was received of the disaster to the whaling fleet at Point Barrow, came a report that American miners in the Klondyke country were in danger of starvation and unless relief was sent to them at once they would certainly perish. This called for another expedition through ice and snow, over the mountain passes into the Yukon Valley; and Congress promptly appropriated the necessary funds to send Dr. Jackson to Lapland to secure a large number of reindeer with their drivers to conduct the relief expedition.

Dr. Jackson reached Lapland in January, 1898, purchased five

hundred and twenty-six trained reindeer, and gathered together sixty-eight drivers (Norwegians and Laplanders) with their families, and sailed for New York in February. At New York special trains met the expedition and carried it across the continent to Seattle. It was shipped by vessel to the headwaters of the Lynn Canal, where it was landed and, after some delay, the journey was commenced over the mountain passes in the direction of the headwaters of the Yukon River. There the expedition was to have proceeded down the Yukon to the relief of the supposed straving miners, for whom abundant supplies were carried by the expedition.

This expedition was a failure. Nearly three hundred of the reindeer died of starvation after reaching the Alaska coast because of the failure of the government to provide suitable arrangements for feeding the herd while it was being driven from the seacoast to the moss fields at the head of Chilkat River, fifty miles distant. The remaining two hundred, weakened by starvation, were driven to the Yukon Valley by easy stages, and there the expedition was abandoned, but not before it was learned that there were no starving miners in the Yukon Valley.

The Scandinavians and Laplanders who had been brought over were distributed among the reindeer stations, to be there employed to teach the natives how to care for the reindeer. A number of these were permitted to retire from the government service, and they naturally drifted into the mining section.

The Klondyke placers on the upper Yukon within Canadian territory were discovered in 1896. This remote region became at once a territory of most intense interest throughout the civilized world, and as adventurers congregated at this point, prospectors naturally drifted down the Yukon River into the American territory of Alaska hunting for new gold fields which were said to exist in that region.

In March, 1898, some gold was found in the gravel on Melsing Creek, and a little later placers were found on an adjacent stream named Ophir Creek, both tributaries of the Niukluk River, and the latter a tributary of Fish River, emptying into Golofnin Bay. On the bank of the Niukluk River, at the point of its junction with Melsing Creek, was located Council City.

Three individuals, who will figure somewhat conspicuously in the proceedings with which we are to deal, met at this place by chance in August, 1898. They were John Brynteson, Erick O. Lindblom and Jafet Lindeberg.

Brynteson was a native of Sweden, but had been naturalized as a citizen of the United States in the State of Michigan in 1896. He had been a coal and iron miner in Michigan before going to Alaska, where he went in the spring of 1898 in search for coal. Arriving at Saint Michaels, he heard of the gold discoveries on Ophir Creek near Council City, and he immediately departed for that place.

Lindblom was also a native of Sweden, and had also been naturalized as a citizen of the United States in the State of Montana in 1894. He had been a tailor and for years followed his trade in San Francisco. In the spring of 1898 he shipped on board of the bark Alaska as a sailor and was carried north to Bering Sea. At Port Clarence he left the vessel and found his way down the coast to Golofnin Bay, and thence up Fish River and its tributary Niukluk to Council City.

Lindeberg was a native of Norway. He came to this country with Dr. Jackson in the spring of 1898 as a reindeer herder. He was directed to Saint Michaels where he was released from his employment, and he thereupon proceeded to Council City where he met Brynteson and Lindblom. These three came together by chance, as I said before, in August, 1898.

They prospected some in that district; but being dissatisfied with the locality, they formed what they termed a prospecting companionship, the purpose of which was to prospect over a wider range of territory. They returned to Golofnin Bay and, taking a boat, proceeded up the coast to the mouth of Snake River and up this river to a tributary, afterwards named Anvil Creek from an anvil shaped rock standing on the summit of a mountain near by. Here, on the 22d of September, 1898, these three inexperienced prospectors made the discovery of gold that was destined to make that region famous throughout the world. Their discovery does not appear to have been the first in that locality, but it was the first that was followed up by a location and led to results; and the association of these three prospectors afterwards became known as the Pioneer Mining Company.

On the day of their discovery, they located a placer mining claim of about twenty acres including the point of discovery and designated the claim as "Discovery Claim." In addition to this, each of them staked a separate claim in his own name on the creek. This locating of an additional claim by these discoverers was understood to be the local custom in Alaska as a reward for making

the discovery, and it was not prohibited by the laws of the United States.

Lindeberg was not then a citizen of the United States; but he had, on July 22, 1898, declared his intention to become a citizen of the United States before the Commissioner at Saint Michaels. This declaration of Lindeberg was ineffective, as the laws of the United States require that such a declaration shall be made before a *court of record* and the Commissioner's court was not a *court of record for that purpose.*

On the 5th of June, 1899, Robert Chipps, a citizen of the United States, claimed to have located the same ground; in other words, he "jumped" the claim. This was nine months after the "Discovery" location. It subsequently appeared that Chipps made the location over the prior location, because he understood that Brynteson, Lindeblom and Lindeberg were aliens and that their location was void by reason of that fact and that the ground was therefore open to location, occupation and purchase by a citizen of the United States. The fact was that only Lindeberg was an alien at that time but he subsequently declared his intention to become a citizen before a court of competent jurisdiction.

Section 2319 of the Revised Statutes provides that all valuable mineral deposits in land belonging to the United States are free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase by *citizens of the United States and those who have declared their intention to become such.* This limitation as to citizenship of the locator does not, however, come into play until an application is made to the government for a patent. Prior to that time the alienage of an original locator cannot be brought into question by a subsequent and contesting private locator—only the government can raise that question.[1] Besides, prior to the application for a patent the applicant may become a citizen of the United States or declare his intention to become such, and he thereby becomes entitled to his patent with precisely the same right as though he were a citizen of the United States.

Had this location by Brynteson, Lindblom and Lindeberg been the only location in which the alienage of the locator was involved,

---

[1] Billings v. Aspen Mining & Smelting Co. (1892), 51 Fed. 338, 52 Fed. 250; Lone Jack Mining Co. v. Megginson (1897), 82 Fed. 89; Manuel v. Wulff (1894), 152 U. S. 505, 511, 38 L. Ed. 532, 14 Sup. Ct. Rep. 651; McKinley Creek Mining Co. v. Alaska United Mining Co. (1902), 183 U. S. 563, 571, 46 L. Ed. 331, 22 Sup. Ct. Rep. 84.

it is not likely that there would have been any public commotion upon the subject, and the right of Chipps to have made the subsequent location would have been determined adversely to him and no public interest taken in the result. But the situation respecting aliens in the vicinity of Nome at that time and their right to locate mining claims, although not an open question under the law, was agitated as a serious question by those who came on the ground after 1898.

On October 18, 1898, at a miners' meeting, the Cape Nome Mining District was formed and Dr. A. N. Kittleson, who had been in charge of the government reindeer station at Port Clarence, was elected recorder. The mining claims that had been located were thereupon filed for record and duly recorded.

When the discovery of gold on Anvil Creek was made on September 22, 1898, the information was passed through channels that brought to that locality, from near-by points, some of the people I have just mentioned; that is to say, the first prospectors on the ground were the Swedes, Norwegians and Laplanders in the immediate vicinity; and they proceeded to cover that creek and its benches and other creeks and benches in that neighborhood with their locations. It is said they staked the whole country. This, if so, was the abuse of a privilege which it was supposed was sufficiently limited and restrained by the requirement that the location of a mining claim is based upon the discovery of mineral in a paying quantity within the location, and the further requirement that the location is maintained by the actual possession of the locator and the expenditure by him of one hundred dollars' worth of work upon the claim each year. These wholesale locations, made in every direction without discovery and without maintaining a *bona fide* possession, and without the expenditure of labor in the development of the claims, did not, of course, comply with these requirements; but the original locations on Anvil Creek, made after discovery and held by actual possession and required expenditures, did comply with the law.

Anvil Creek is a short creek of about six miles in length; but only about three and one-half miles of the creek appeared from prospecting to have "pay gravel." The claims as located were usually about 660 feet in width by 1320 feet in length, containing approximately twenty acres—the limit provided by law. Four of such claims would extend a mile along the length of the creek, and twelve claims would about cover all that part of the creek of any

apparent value as mining ground. A few locators could, therefore, legally appropriate what appeared to be the entire valuable gravel deposits; but these deposits were enormously rich.

It therefore happened that, when news of the great discovery had reached the outside world, prospectors and others, in the spring of 1899, made a rush for the new gold field from Dawson and the upper Yukon and from the Pacific Coast; but when they arrived at Nome, they found they had been forestalled by locations in the manner stated. The newcomers became exasperated, or thought they were, over the situation, contending that aliens had no right to locate a mining claim on the public domain, and, further, that in no event could even a citizen of the United States locate more than one claim on the same creek.

These objections to the original, prior locations on Anvil Creek had no foundation in law or fact. In the act of Congress providing a civil government for Alaska, approved May 17, 1884,[2] it was provided that the general laws of the State of Oregon then in force were declared to be the laws of said district (Alaska), so far as the same might be applicable and not in conflict with the provisions of the act or the laws of the United States.

The general laws of Oregon provided that:

> "Any alien may acquire and hold lands, or any right thereto, or interest therein, by purchase, devise, or descent, and he may convey, mortgage, and devise the same, and if he shall die intestate, the same shall descend to his heirs; and in all cases such lands shall be held, conveyed, mortgaged, or devised, or shall descend in like manner and with like effect, as if such alien were a native citizen of this state or of the United States; and any corporation incorporated under the laws of any other state in the United States, or of any foreign country, not prohibited by the constitution or laws of this state from carrying on business in this state, may acquire, hold, use, and dispose of, in the corporate name, all real estate necessary or convenient to carry into effect the object of the incorporation and the transaction of its business, and also any interest in real estate by mortgage or otherwise, as security for moneys due to or loans made by such corporation."[3]

It was provided further, that:

> "The title to any lands heretofore conveyed shall not be questioned, nor in any manner affected, by reason of the alien-

---

[2] 23 Stat. at L. 24.
[3] Lord's Oregon Laws, § 7172.

age of any person from or through whom such title may have been derived." [4]

These sections of the Oregon laws were not in conflict with any act of Congress; on the contrary, they were in conformity with such laws.

By the Act of Congress approved March 2, 1897,[5] it was provided that no alien or person who is not a citizen of the United States, or who has not declared his intention to become such, should acquire title to or own any land in any of the territories of the United States, *except as in the act provided.* The act then provided that it was not to apply to any alien who should become a bona fide resident of the United States, and any alien who should become a bona fide resident of the United States, or who should have declared his intention to become a citizen of the United States, should have the right to acquire and hold lands in either of the territories of the United States upon the same terms as citizens of the United States. It was further provided *that the act should not be construed to prevent any persons, not citizens of the United States, from acquiring lots or parcels of lands in any incorporated or platted city or town or village, or in any mine or mining claim, in any of the territories of the United States.* Furthermore, there was no law of the United States prohibiting any locator of a mining claim from locating more than one claim. The limitations I have mentioned were supposed to place a sufficient restraint on the exercise of this privilege.

But, notwithstanding this state of the law in Alaska, it was contended, as before stated, by the late-comers into the Nome region, that all prior locations were invalid; and for the purpose of having this declared to be the local law at Nome, a miners' meeting was called at Nome for July 10, 1899. For this meeting there had been prepared in advance a resolution declaring all existing locations void.

Meanwhile, men had been stationed upon Anvil Mountain, about three and a half miles from Nome, with instructions that upon the passing of the resolution a bonfire should be started in Nome, at which signal the men were to hurry down from the mountain and obtain possession of the claims on Anvil Creek; thus forestalling the rush that would probably follow from Nome.

---

[4] Lord's Oregon Laws, § 7173.
[5] 29 Stat. at L. 618, U. S. Comp. Stat. § 3490 ff.

A rumor of this intended action on the part of the miners' meeting had come to Dr. Kittleson, the recorder of the district, who communicated with the military authorities at Saint Michaels whose duty it was to preserve the *status quo* until a court was established; and Lieutenant Spaulding and two or three men were directed to attend the meeting, which they did, and took places on the platform. When the resolution was introduced declaring all the locations in the district void and the land open for relocation, Lieutenant Spaulding ordered that the resolution be withdrawn within two minutes, stating that he considered it not for the good of the community and if it were not withdrawn he would clear the hall. There was some hesitation on the part of the meeting to comply with this order; but at the end of the two minutes the Lieutenant ordered his men to clear the hall, and it was done.

It is evident that, whatever may have been the military qualifications of this officer for "preparedness," he was an accomplished parliamentarian. Translated into parliamentary language, he knew that a motion to adjourn was always in order. He made the motion himself, put it, and declared it carried and the meeting adjourned; or, in the crisp but expressive language of the Congressional Record, "the committee arose and the house adjourned."

I mention this incident because it has been denounced in some quarters as a military usurpation and tyranny. It was the exercise of a little common sense by the officer in an emergency and clearly for the purpose of preventing rioting and bloodshed, and it did so.

But the "jumping" of claims continued preparatory to other proceedings against these original locators. The immediate strain was, however, somewhat relieved in a very unexpected manner: it was accidentally discovered that the beach sands on the shore of the sea adjacent to Nome were rich with gold and it was found that good wages could be made by the use of the primitive rocker in washing the gold out of the sand. Many of the late-comers accordingly turned their attention to this new and extraordinary gold field. But the Anvil Creek locations were not forgotten; they were too rich to be abandoned to aliens without a struggle.

About this time, Mr. Charles D. Lane, of California, arrived at Nome. He was a well known citizen. He had been in Alaska before and was acquainted with the country. He was then a man of wealth and business standing, having been a part owner with Mr. Hayward and Mr. Hobart in the famous Utica mine at Angels, in Calaveras County in this state. He was a man of great energy

and practical ability and had been interested in many mining and industrial enterprises in this state and elsewhere. He was noted for his fair dealings in all his business enterprises, and in Nome he continued to maintain that reputation.

As an experienced and practical miner, Mr. Lane found that Anvil Creek gave promise of yielding great wealth with the proper equipment for carrying on placer mining on a large scale. He accordingly negotiated with some of the original locators, three of whom were Laplanders, for their possessory rights, and succeeded in securing four claims for which he is reported to have paid about $300,000. He also located and secured possessory rights in other localities, and proceeded to work these claims with modern appliances. He established a line of steamers from San Francisco to Nome by the way of Seattle; he erected warehouses and other buildings in Nome, and built and equipped a railroad from Nome to the mines. All these enterprises he conveyed to a corporation, of which he was the president and principal stockholder, and named his corporation the Wild Goose Mining and Trading Company. Rather a curious but not an inappropriate name for an Alaska corporation engaged in mining. Fortunately, the chase of the wild goose in this case turned out to be a financial success.

But this corporation and its mining property on Anvil Creek, together with the mining property of the Pioneer Company, on the same creek, became the storm center of the bitter controversy then being waged against the original locators on Anvil Creek and which is described by Beach in "The Spoilers" and in "The Looting of Alaska." The controversy was transferred to Washington in an effort to invalidate these original locations by congressional legislation.

Mr. Hubbard, of the law firm of Hubbard, Beeman & Hume, located at Nome, had charge of the so-called "jumpers'" locations adverse to the claims of the Pioneer and Wild Goose Companies. In the winter of 1899 and 1900 he was in Washington with Chipps. They were brought into relation with Alexander McKenzie, an active and influential politician of Minnesota and the Dakotas. The latter organized a corporation called the Alaska Gold Mining Company, with a capital of $15,000,000, and had it incorporated under the laws of Arizona. He retained a majority of the stock for himself and with shares of the remaining stock he procured "jumpers'" titles to certain mining claims at Nome, among others the Chipps location on Discovery Claim.

A bill was then pending in Congress providing for a civil government for Alaska. It was reported out of the Committee on Territories by Senator Carter of Montana on March 5, 1900. The bill as reported was substantially the laws of the State of Oregon as they had been found applicable under the Act of Congress of May 17, 1884.[6] The bill contained, among other provisions, the law of Oregon, providing that aliens should have the right to acquire and hold lands in Alaska as if such aliens were citizens of the United States, and providing further that the title to lands theretofore conveyed should not be questioned nor in any manner affected by reason of the alienage of any person from or through whom such titles may have been derived.

When the consideration of this provision of the bill was reached, Senator Hansbrough of North Dakota moved to strike out the provision and insert an amendment providing that aliens should not be permitted to locate, hold or convey mining claims in said district of Alaska, nor should any title to a mining claim acquired by location or purchase through an alien be legal, and in any civil action, suit or proceeding to recover the possession of a mining claim, or for the appointment of a receiver, or for an injunction to restrain the working or operation of a mining claim, it should be the duty of the court to inquire into and determine the question of citizenship of the locator.

This amendment was skilfully drawn by someone familiar with the law respecting the rights of aliens to hold land in the territories of the United States. Its purpose was to set aside the decision of the Supreme Court in Manuel v. Wulff,[7] and the decisions of the courts in other cases already cited; to repeal the Act of Congress of March 2, 1897,[8] relating to aliens holding real estate in the territories; to repeal the Oregon law made applicable to Alaska by the Act of Congress of May 17, 1884;[9] and in very important particulars to modify and enlarge the law relating to the appointment of receivers for placer mining claims and the granting of injunctions to restrain the working and operation of the same.

It was frankly stated by Senator Hansbrough that the amendment was aimed at the Laplanders who had gone to Alaska in the manner and under the circumstances I have stated and had made

---

[6] 23 Stat. at L. 24.
[7] (1894), 152 U. S. 505, 38 L. Ed. 532, 14 Sup. Ct. Rep. 651.
[8] 29 Stat. at L. 618, U. S. Comp. Stat. § 3490 ff.
[9] 23 Stat. at L. 24.

mining locations in the mining region; and it was admitted that its purpose was to invalidate such possessory rights as may have been acquired under the existing law.

The amendment was supported by Senators Carter of Montana and Rawlins of Utah, but it aroused the vigorous opposition of such able Senators as Stewart of Nevada, Teller of Colorado, Spooner of Wisconsin, Bate of Tennessee and Nelson of Minnesota. The latter is a native of Norway and is an able and forceful member of the Senate. I served with him six years in the House and know his intellectual caliber. He is a statesman of a high order. He vigorously opposed the amendment because it was clearly retroactive in terms and because it reflected upon the Laplanders and Scandinavians whom he defended.

Then it was discovered by someone in the Congressional Library that the Laplander was ethnologically suspected of being a member of the dreaded Mongolian race; but this suspicion did not seem to terrify the opposition, and it was finally determined by the friends of the amendment that its real purpose was to exclude the Chinese and Japanese as such. This appeared to be safer ground for popular legislation.

Then the language of the amendment was modified in some minor phrase but not in purpose. The opposition continued; and on the 1st day of May, after having been before the Senate and debated for nearly two months, it was finally withdrawn. The bill went to the House, where the Hansbrough amendment was offered, debated and defeated.

The provision of the Oregon law relating to aliens, incorporated into the bill as reported, went out in the Senate, with the Hansbrough amendment, but the act as it became a law provided that "no person shall be deprived of any existing legal right or remedy by reason of the passage of this act." The result was that Congress, by its refusal to pass the Hansbrough amendment and refusing to deprive anyone of his existing legal rights, preserved the rights of aliens under the statutes and decisions of the courts as fully as legislation could accomplish that purpose by express affirmative action, and that is the law on this subject today.

The bill provided a civil government for Alaska, and was approved June 6, 1900.[10] It established a District Court for the District of Alaska, and provided for the appointment of three judges

[10] 31 Stat. at L. 321.

for the district, to reside in the divisions to which they should be assigned by the President. The President appointed Arthur H. Noyes, of Minnesota, one of these judges and designated him to preside over division number two and to reside at Saint Michaels. This division included Nome.

The act directed that the judge should hold at least one term of court each year at Saint Michaels, beginning the third Monday in June. Each of the judges was authorized and directed to hold such special terms of court as might be necessary for the public welfare and for the dispatch of business of the court; but at least thirty days' notice was required to be given of the time and place of holding such special terms.

Judge Noyes was an old friend and acquaintance of McKenzie. They had known each other in Minnesota; they had been in Washington together during the Senate debate on the Alaska bill; and they journeyed together to Nome, where they arrived on the steamer Senator on the 19th of July, 1900. This was after the time fixed by the statute for holding a term of court at Saint Michaels. On the same steamer returned Robert Chipps. McKenzie and Chipps landed soon after the arrival of the vessel; but Judge Noyes remained on board until the 21st.

We now come to the story told in "The Spoilers." After McKenzie had made satisfactory arrangements with the legal firm of Hubbard, Beeman & Hume, they proceeded in great haste to prepare complaints on behalf of Chipps and the other "jumpers" against the original locators of the Discovery Claim owned by the Pioneer Mining Company and against the locators whose possessory rights had been purchased by the Wild Goose Company. On Monday, July 23d, these complaints were presented to Judge Noyes. There were five in number, entitled: Chipps v. Lindeberg, et al.; Melsing, et al., v. Tornanses; Comptois v. Anderson; Rogers v. Kjellman; and Webster v. Nackkela, et al.

The judge immediately appointed McKenzie receiver in all the cases embracing all the original claims of the two companies on Anvil Creek. The order was made without notice and directed McKenzie to take immediate possession of the property, which he did. It was further ordered that the persons then in possession of the claims should deliver to the receiver their immediate possession, control and management, and the order expressly enjoined the defendants from in any manner interfering with the mining or working of the claims by the receiver or with his control and manage-

ment. The amount of the bond required by the judge of the receiver was five thousand dollars in each case.

When McKenzie was appointed receiver of the mines described in the several complaints, the court had not been organized as prescribed by law, the judge had not been at Saint Michaels, and no notice had been given of a special term of court at Nome where judicial business would be transacted; no process had been issued upon the complaints and no notice had been given the defendants of the application for the appointment of a receiver; and the complaints had not been filed with the clerk of the court so as to give the judge jurisdiction over the cases.

It is a fundamental principle of constitutional law that no one shall be deprived of his property without due process of law. What is due process of law, is a subject of wide import. But its purpose is easily stated: it is to secure every person, whether citizen or alien, against the arbitrary exercise of governmental or judicial powers in violation and disregard of established principles of justice.[11] It is a principle of established justice that no one shall have his property taken from him without notice of the procedure which it is proposed to invoke to accomplish that purpose and an opportunity to be heard upon the legality and justice of such procedure.

As said by the Supreme Court of the United States in Pennoyer v. Neff,[12] discussing the meaning of the words "due process of law" as applied to judicial proceedings:

> "They then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."

In the case of Roller v. Holly,[13] the Supreme Court said:

> "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority could give additional weight."

In these cases at Nome no notice was given the defendants of the filing of the suits or of the applications made to the court for the appointment of a receiver, and no process had been issued. The first the defendants knew of the proceedings was the appearance of the receiver at the mines on the night of July 23d, armed

---

[11] Guthrie on the Fourteenth Amendment, p. 67.
[12] (1877), 95 U. S. 714, 733, 24 L. Ed. 565.
[13] (1900), 176 U. S. 398, 409, 44 L. Ed. 520, 20 Sup. Ct. Rep. 410.

with only the process of the court, to take possession of the property. This was manifestly a violation of the constitutional right which a person has to retain possession of the property in his possession until a hearing has been had upon the question of a right of possession.

Furthermore, the authorities state with great clearness that the power to appoint a receiver is a delicate one and should be exercised sparingly and with extreme caution.[14] It is a power which, unless used carefully, has a tendency to run into uncontrolled and arbitrary action on the part of a single judge.[15]

It is a rule that the receiver shall be required to give a good and sufficient bond to indemnify the parties to the action in the event the receiver shall prove unfaithful to his trust. In the complaint against the locators of the Discovery Claim, it was alleged that the defendants were extracting each day the mine was being operated gold dust of the value of fifteen thousand dollars. A similar allegation was made with respect to one of the claims of the Wild Goose Company, while it was alleged that from five to ten thousand dollars in gold dust was being extracted each day from the other claims. The bond required of McKenzie as receiver for each of these claims was five thousand dollars, or the equivalent of what each of these claims could produce in a few hours. The bond was manifestly insufficient.

The primary object of a receiver is to preserve the property in controversy so that it may be subjected to such order or decree as the court may finally make in the particular case. The sole value of the mining claims in these cases was the gold contained in them. The extraction of this gold by the receiver was the taking of the very substance of the property and it was so alleged in the complaints. To preserve such property, no receiver was required; the gold was safe where it was.

In a proper case, the court might, by injunction, order that the working of the mine should cease and that the property should remain *in statu quo* until the termination of the suit; but such an order would not require a receiver to carry it into effect. The appointment of a receiver in these cases did not even come under that jurisdiction of the court.

---

[14] Sage v. Memphis etc. R. R. Co. (1888), 125 U. S. 361, 31 L. Ed. 694, 8 Sup. Ct. Rep. 887.

[15] Hutchinson v. American Palace-Car Co. (1900), 104 Fed. 182, 187.

It sometimes occurs in the case of a controversy over the title to a vein or lode mine that its continual supervision and operation is required. With underground workings supported by timbers which have to be looked after, repaired and replaced, and with water percolating into the tunnels, drifts and shafts of the mine, it might be necessary to keep the mine in operation and a receiver appointed for that purpose. But that was not the situation in any one of these cases, and a receiver was not required in that view of the controversy.

A receiver is appointed on behalf of all parties to the action and not on behalf of the complainant or defendant only.[16] It is, therefore, a rule that in adversary proceedings a receiver must be an impartial and disinterested person and without any interest in the result of the suit.[17]

Was McKenzie a disinterested person in these cases? The record contains some extraordinary evidence upon this question. McKenzie had secured the title of the plaintiff, Chipps, in the Discovery Claim for himself, or for the Alaska Gold Mining Company of which he was the president and owned a majority of the stock. But this was but a small part of his interest in the litigation. It appears from the evidence of Hume, of the legal firm of Hubbard, Beeman & Hume, that on Thursday, July 19th, the day of his arrival at Nome, McKenzie went to the offices of the above-named attorneys and had an interview with Mr. Hume in which he told the latter that Hubbard had transferred to him, McKenzie, his interest in the litigation, which involved the right of possession of the Anvil Creek mining claims, and that Hubbard had represented to him that the other members of the firm would do the same, that is, would transfer to his corporation the contingent interest they had in those claims. *The contingent interest of Hubbard, Beeman & Hume was a one-half interest in the claims in case the plaintiff prevailed.* Hume testified that McKenzie further represented to him and to Beeman that *he controlled the appointment of the judge and the district attorney, and that if they desired to have those cases heard it would be absolutely necessary to transfer their interest to his corporation, and receive in lieu certificates of stock; and he testified that, at the same time, McKenzie demanded that a*

---

[16] Atlantic Trust Co. v. Chapman (1908), 208 U. S. 360, 371, 52 L. Ed. 528, 28 Sup. Ct. Rep. 406.

[17] 34 Cyc. 140.

one-fourth interest of the business of Hubbard, Beeman & Hume be transferred to Joseph K. Wood, the district attorney, and that Wood become a silent partner in the firm, and stated that, if all this were assented to, Hume should become deputy district attorney. The evidence shows that Hume and his partners agreed to these suggestions, and Wood became a silent partner in the firm of Hubbard, Beeman & Hume, and that Hume was appointed deputy district attorney. All this was done on Thursday, July 19th. The evidence shows that on the same day, and immediately after making these arrangements, *McKenzie took Hume and Beeman aside and demanded that an entire one-fourth interest of the firm be placed in his, McKenzie's, name, and that he receive one-fourth of the profits.* Hume testified that this was assented to on the next morning (Friday, July 20th), after much objection and hesitation, and only after McKenzie had threatened him that, if he refused, his business and the interests of his clients would be ruined. He testified further that partnership articles were drawn up and signed in accordance with the agreement.[18]

McKenzie was, therefore, not only not a disinterested person in these cases, but his relation to the litigation was such that he was absolutely unfitted for the office of receiver; and this the court must have known, if not directly, certainly from all the surrounding circumstances.

The complaints alone were sufficient to put the court on notice that there was something seriously wrong in the proceedings:

> One of the cases was an ordinary action in ejectment, without a single allegation of an equitable nature entitling the plaintiff to the appointment of a receiver;
>
> In another case, the order granting the injunction and appointing the receiver was based upon an unverified bill of complaint. There was, however, a reference to a complaint at law, verified by the plaintiff a year before, entitled in a court that had been abolished by the act of Congress;
>
> The complaints were, therefore, upon their face, insufficient in point of law and subject to demurrers *ore tenus,* rendering the appointment of a receiver improper for that reason alone.
>
> In all the cases, the complaints alleged that the plaintiffs were citizens of the United States and that the defendants were aliens and had never declared their intention to become citizens of the United States. These allegations were the statements

---

[18] In re Noyes; In re Geary; In re Wood; In re Frost (1902), 121 Fed. 209, 213.

> of the causes of action against the defendants, which, upon any fair examination of the law, would have been found not to be causes of action in any case.

The defendants at the earliest opportunity moved the court, upon suitable affidavits and objections to the procedure, to vacate the orders appointing McKenzie receiver in the various cases. The motions were denied. The defendants thereupon moved the court for leave to appeal to the Circuit Court of Appeals from the orders granting the injunction and appointing the receiver in all the cases. At the same time, they presented to the court proper bonds on appeal, together with assignments of errors and proposed bills of exceptions for settlement and allowance. The court disallowed the bills of exceptions, denied the petitions for appeals, and declined to accept or fix the amount of any bond for costs or allow supersedeas bonds to be given in any case.

On the same day, the court enlarged the power and authority of the receiver and directed him to take into his possession all the personal property on the Discovery Claim. Three weeks later similar orders were made in the other four cases. These orders were in direct violation of the law which limited the power and authority of a receiver to the taking possession of other than specific personal property; and the whole proceedings from the initial order to the last, in the particulars mentioned were in violation of law or well established rules of procedure.

The defendants thereupon forwarded petitions for appeals, with the accompanying papers, to the Circuit Court of Appeals at San Francisco. That court not being in session, the applications were presented to me as a judge of that court, and after a hearing upon the applications, from which it appeared that the judge of the lower court had grossly abused the judgment and discretion vested in him by law, I allowed the appeals in all the cases; directed that citations issue; accepted and approved supersedeas bonds; directed that writs of supersedeas be issued, and approved the forms of such writs.

In accordance with these orders, the proper citations and writs were issued and filed in the District Court at Nome, and copies thereof served upon McKenzie and demand made upon him for the restitution of the property in accordance with the directions of the writs. McKenzie refused to comply with these orders and writs and the court refused to enforce them. This fact was then brought to the attention of the Circuit Court of Appeals in session at San

Francisco, and upon a hearing the court found that McKenzie had contumaciously refused to obey the processes of the court. We thereupon directed two deputy United States marshals to proceed to Nome, enforce the orders of the court, arrest the offending receiver and produce him at the bar of the court.

The deputy marshals proceeded to Nome, and found that more than $200,000 in gold dust taken from the claims in controversy by McKenzie was in the Alaska Banking and Safe-Deposit Company at that place. This gold dust McKenzie refused to deliver to the marshals and refused to produce the keys to the safe-deposit vaults where the dust was deposited, claiming to have given the keys to the district attorney. McKenzie and his followers threatened that in the event the marshals should attempt to execute the orders of the court, a number of persons would be killed. Serious trouble seemed imminent.

The deputy marshals prepared accordingly, and the military was summoned to their aid; and, under that protection, the deputy marshals arrested McKenzie, broke open the vaults of the safe-deposit company, took the gold dust therefrom and delivered it to the defendants as directed by the court, and they brought McKenzie to San Francisco to answer the order to show cause why he should not be punished for contempt of court.

McKenzie applied to the Supreme Court of the United States for a writ of certiorari to have the questions at issue determined by that court. The Supreme Court denied the petition,[19] and McKenzie was thereupon tried by the Circuit Court of Appeals and found guilty and sentenced to imprisonment in the county jail of Alameda County for a term of one year.[20]

It was urged on behalf of McKenzie that his refusal to obey the writs of supersedeas was based on the advice of counsel that the writs were void. To this defense, Judge Ross, speaking for the court, said:

> "The circumstances attending the appointment of the receiver in these cases, however, and his conduct after, as well as before, the appointment, as shown by the record and evidence, so far from impressing us with the sincerity of the pretension that this refusal to obey the writs issued out of this

---

[19] Chipps and McKenzie, Receiver v. Lindeberg (1900), 179 U. S. 686, 21 Sup. Ct. Rep. 919.

[20] Tornanses v. Melsing (1901), 106 Fed. 775.

> court was based upon the advice of his counsel that they were void, satisfy us that it was intentional and deliberate, and in furtherance of the high-handed and grossly illegal proceedings initiated almost as soon as Judge Noyes and McKenzie had set foot on Alaskan territory at Nome, and which may be safely and fortunately said to have no parallel in the jurisprudence of this country."

McKenzie thereupon presented a petition to the Supreme Court of the United States for a writ of habeas corpus to have the cause of his imprisonment inquired into by that court. This petition was heard, and in an opinion where all the proceedings of the Circuit Court of Appeals and of the District Court at Alaska were reviewed, the proceedings of the Circuit Court of Appeals were affirmed.[21] McKenzie thereupon applied to the President of the United States for a pardon, supported by strong political influence. The pardon was at first refused; but, upon representation and evidence that McKenzie's health was such that he would probably not live out his term of imprisonment, he was pardoned—but not until he had turned over to the defendants an additional quantity of gold dust he had shipped to Seattle while the proceedings were in progress.

Thereupon, orders were issued by the Circuit Court of Appeals directed to Judge Noyes and certain others charged with disobeying the orders and writs of the court, to show cause why they should not be punished for contempt of court. Upon a hearing, Judge Noyes and certain of the others were found guilty.[22] In the opinion of the court, written by Judge Gilbert, the proceedings in the lower court are characterized in the following luminous language:

> "The proceedings upon which the receiver was appointed were extraordinary in the extreme. Immediately after his arrival at Nome in company with the man who, it seems, had gone to Nome for the express purpose of entering into the receivership business, and who boasted to others that he had secured the appointment of the judge, and that he controlled the court and its officers, upon papers which had not as yet been filed, before the issuance of summons, and before the execution of receiver's bonds, without notice to the defendants, without affording them an opportunity to be heard, Judge Noyes wrested from them their mining claims, of which they

---

[21] In re McKenzie (1901), 180 U. S. 536, 45 L. Ed. 657, 21 Sup. Ct. Rep. 468.

[22] In re Noyes; In re Geary; In re Wood; In re Frost (1902), 121 Fed. 209, 221.

were in the full possession, the sole value of which consisted of the gold dust which they contained, and which lay safely stored in the ground, and placed the claims in the hands of a receiver with instructions to mine and operate the same, and this without any showing of an equitable nature to indicate the necessity or propriety of the receivership, or the necessity for the operation of the mines by a receiver in order to protect the property or to prevent its injury or waste. When the defendants undertook to appeal from these orders, their right of appeal was denied them. The receiver so appointed was permitted to go on and mine these claims on an extensive scale, and extract from them their value. According to the testimony, some of the mines were 'gutted.' The appointment of the receiver was, in the case of Chipps vs. Lindeberg, almost immediately followed by an order authorizing the receiver to take into his possession all the personal property of the defendants which was found upon the claim, including their stores, provisions, tools, and tents. The order so made was so arbitrary and so unwarranted in law as to baffle the mind in its effort to comprehend how it could have issued from a court of justice."

The defendants were sentenced to terms of imprisonment, except Judge Noyes, who was fined one thousand dollars. His imprisonment by the court would have been in effect a removal from office—a punishment which a majority of the court did not deem it was authorized to impose. That feature of the case was therefore left with the President; and after an independent investigation by the Department of Justice, under the direction of the President, Judge Noyes was removed from office by the President.

In the meantime, the cases on their merits were brought to the Circuit Court of Appeals. Three cases[23] were heard on their merits, and the orders appointing the receiver were reversed and the cases remanded with instructions to dismiss the bills. The "jumpers'" claims were based exclusively on the alleged alienage of the prior locators and were found wholly without foundation as causes of action.[24]

In Anderson v. Comptois,[25] and Lindeberg v. Chipps,[26] the judgments of the lower court were reversed and decrees entered upon their merits in favor of the defendants upon stipulations of the par-

---

[23] Tornanses v. Melsing (1901), 109 Fed. 710; Kjellman v. Rogers (1901), 109 Fed. 1061; Nackkela v. Webster (1901), 109 Fed. 1061.

[24] Tornanses v. Melsing (1901), 109 Fed. 710.

[25] (1901), 108 Fed. 985.

[26] (1901), 108 Fed. 988.

ties; and a like order was rendered in another case entitled Lindeberg v. Requa.[27] In Anderson v. Comptois,[28] the Circuit Court of Appeals, speaking of the proceedings in that case, said:

> "There is but one conclusion to be drawn from such proceedings, and that is that the appointment of a receiver to work and mine the placer claims owned by the defendants was the beginning and the end of the causes of action."

The situation at Nome during these proceedings in the year 1900 was represented as being deplorable in the extreme. No one cared to develop a mining claim or to make any effort in that direction, for, if it proved valuable, it would probably be "jumped" upon some pretense or other, suit brought, and the claim placed in the hands of a receiver. There was no incentive to enterprise while this judicial menace was suspended over the community.

In the fall of 1901 and after the removal of Judge Noyes, the Attorney General designated Judge Wickersham, of the third division, to hold a term of court at Nome. Upon his arrival at that place, he proceeded to dispatch the business of the court with such ability, firmness and fairness that the administration of justice was made to command the immediate respect and confidence of the community. The supremacy of law was established. The usual result followed. Business and mining enterprises were restored to their proper channels and the community proceeded to take such advantage of the wonderful resources of the locality as to make it one of the greatest mining camps in the world.

Returning now to the Kipling declaration made in 1896, that "There is never a law of God or man runs north of Fifty-three," and its repetition by Beach in the story of "The Spoilers," we have this now to say for Alaska and her territorial waters: Lawlessness has practically disappeared and the restraints of civilized life have taken its place.

After long negotiations conducted by our State Department, the Taft administration in 1912 secured treaty stipulations with Great Britain, Russia and Japan prohibiting pelagic sealing in Bering Sea; and the seal herd, decimated by ruthless slaughter almost to the point of extinction, is now slowly recovering and in a few years, under the wise and careful supervision of the government, will probably be restored to its former vigor and importance.

---

[27] (1901), 108 Fed. 988.
[28] (1901), 109 Fed. 971, 975.

For the vast territory of Alaska as a whole, and for that part of it involved in this discussion in particular, we say the law is supreme, and is being administered by its judiciary with as much wisdom and efficiency as in any other part of the United States. Congress has given its attention to the needs of the territory; and by providing laws for the development of its wonderful resources, it is being made the home of an industrious, law-abiding and prosperous people.

William W. Morrow.

United States Circuit Court of Appeals,
San Francisco, California.

Lederer, Street & Zeus Co., Printers, Berkeley, Cal.

LIBRARY OF CONGRESS
0 017 297 745 5